No. 18828

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM BRUCKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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I N D E X

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Cases: (continued)

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JURISDICTIONAL STATEMENT

Appellant brought this action against the United States under the Federal Tort Claims Act (28 U.S.C. 1346(b)), asserting liability for the injuries he received as a member of the Castle Air Force Base Aero Club while riding in an airplane which he had rented from that Club, which was being piloted by another member of the Club (R. 26-29, 45-48).[1] The asserted liability was based solely upon the alleged negligence of

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1/ "R." references are to Volume I of the Record as reproduced in this Court. "Tr." references are to the transcript of testimony, which forms Volumes II and III of the Record here.

the pilot of the airplane (R. 58-61). After a full trial the district court found that the pilot was not flying the airplane as an agent of the Club or as an agent or employee of th United States, and entered a judgment dismissing the complaint from which this appeal is taken (R. 76-80, 83).

The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

1. The basic facts. The basic facts were found by the district court (R. 76-79), and are now largely undisputed.

The Castle Air Force Base Aero Club was organized under the provisions of Air Force Regulations (AFR) 34-14 and 176-1, in 1957, as a non-appropriated fund instrumentality of the United States (Ex. E). Its principal purpose was to provide an opportunity for Air Force personnel and their dependents "to engage in flying as a recreational activity" and thereby to encourage the acquisition and development of aeronautical skills (R. 77, Finding IV; R. 14, AFR 34-14, para. 2, infra, p. 2a). Membership in the Club was voluntary and was open to civilian employees of the Air Force, retired military personne and their dependents, as well as to active duty personnel and their dependents (R. 14, AFR 34-14, para 4, infra, pp. 2a-3a; Ex. 2, Ex. H, Article III A, infra, p. 5a). The Club had its own constitution and by-laws (Ex. 2, Ex. H, infra, pp. 5a-9a), and elected its own officers (R. 77, Finding IV). The Club wa designed to be self-supporting financially, receiving its income from initiation fees, membership dues, and fees for the

rental of its airplanes (Ex. 2, Ex. H, Article V and III, infra, pp. 6a, 5a). The powers and business of the Club was exercised and controlled by an executive board of six members, elected by members of the Club at the annual meeting. The President of the Club, who was to serve without compensation, had general charge of the business of the Club, subject to the advice and control of the executive board, and was responsible for its operation. In particular, he was responsible for determining the suitability of equipment and qualifications of members for all flight operations (Ex. 2, Ex. H, para. 4, infra, p. 8a).

The Club's facilities were located at Buller Field, approximately three miles from Castle Air Force Base (Tr. 125-126). Members of the Club who wished to fly would rent the airplane on an hourly basis from the Club (R. 77, Finding II; Tr. 123). Members of the Club participated in its activities on their own time, i.e., only while they were off duty (Tr. 55, 58, 74-75).

For those members who wished to have flying instruction, the Club maintained a list of flight instructors at its headquarters. The list contained the names of persons who had Federal Aviation licenses to give civilian flying instruction, and who had been designated by the Club to instruct its members in Club airplanes (R. 77-78, Finding V; Tr. 129). Some of the instructors were not members of the Club. The members selected

the instructors, engaged them privately, and were allowed to make their own financial arrangements with them (Tr. 131-132). It was the practice for a student member to pay the instructor he selected $3.00 per hour for instructions (R. 78, Finding V).

The Club also maintained a roster of "check" pilots, who were licensed pilots, authorized by its rules to "check out" other licensed pilots in airplanes they had not previously flown, in order to comply with the Club's rule that a pilot must be checked out in an airplane he had not previously flown before flying it alone (R. 78, Finding VI; Tr. 164). Check pilots, like other members who held licenses, were authorized to fly Club airplanes with passengers (Tr. 165-166).

In 1959, appellant was an enlisted man in the United States Air Force, with the rank of technical sergeant, assigned to Castle Air Force Base as a fire fighting supervisor (R. 76-77, Finding I). He had previously become a member of the Aero Club, and had taken instruction from civilian flying instructors on the Club's list of qualified instructors, as well as from a Master Sergeant Graves, who was both the President of the Club and a qualified flying training instructor (R. 77, 78-79, Findings IV and VII; Tr. 131-132). On May 28, 1959, he flew solo for the first time (Tr. 61).

On Saturday afternoon, June 6, 1959, after being released from fire alert duty, appellant went out to Buller Field in the hope that he could take another solo flight under Sgt.

Graves' supervision (Tr. 75). When he learned that Sgt. Graves was not at the field, he asked Lieutenant Maurice Hammack, who was also off-duty, to accompany him on a flight (R. 76-77, Finding I). Hammack was a member of the Club and a rated military pilot (R. 77, 78, Findings I and VII). He was not a qualified instructor, as appellant knew, and his name was not upon the Club's list of qualified instructors (R. 79, Finding VII; Tr. 118); but he held a civilian commercial pilot's license, and was a listed check pilot and club member authorized to fly with other persons in the airplane (Tr. 163, 165-166). Sgt. Graves was apparently unaware of the proposed flight (Tr. 73-77).

When Hammack agreed to appellant's suggestion, appellant rented an Aeronca Champion airplane, owned by the Club, on an hourly basis for $3 an hour (R. 77, Finding II; Tr. 76, 123-124). They took off, with Lt. Hammack in the rear (pilot's) seat, and appellant in the front seat (R. 77, Finding III; Tr. 76-82). At approximately 3 p.m., while Hammack was flying the airplane and attempting to demonstrate to appellant a low altitude, down wind, power off, forced landing procedure, the airplane crashed, and appellant sustained injuries (R. 77, 78, Findings III and VII).

2. District court proceedings. After his state court action against Hammack, Graves and the Castle Air Force Base Aero Club had been removed to the district court on the ground

that the Club was a Federal instrumentality, appellant brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., alleging that hi injuries resulted from the negligent flying of the airplane by Hammack and claiming $273,000 in damages (R. 45-48). The pre-trial conference order specified that appellant was seeking recovery solely on the basis of the asserted negligence of "Hammack as agent or employee" of the United States and the Aero Club; and jurisdiction was asserted solely on the ground that Hammack was flying the airplane within the scope of his employment (R. 58, 59). The parties agreed upon many of the facts set forth above (R. 59-61). The Government did not contest the negligence of Hammack, but asserted, inter alia, (1) that Hammack was not acting as an employee of the United State within the scope of his employment; (2) that appellant was guilty of contributory negligence or had assumed the risk of Hammack's conduct; (3) that the California Aircraft Guest Statute was applicable; or (4) that appellant's participation in the flight was incident to his service in the Air Force (R. 63).

At trial, appellant testified on his own behalf. He did not testify, or offer any other direct evidence, that Hammack was employed by the Aero Club, but impliedly conceded that Hammack did not work at the Club (Tr. 124-125). He also admitted that neither Hammack nor Graves had told him that Hamm

was a qualified instructor, and that he had no reason to believe that Hammack was a qualified instructor (Tr. 118-119, 127-128). Although he asserted that he considered himself a student and Hammack an instructor for purposes of the flight (Tr. 132-135), he also conceded that members were free to select their flying instructors and to make their own financial arrangements with them; and that he had paid his instructors $3 per hour, but had not paid Hammack anything on their prior flight together (Tr. 131-132). Appellant testified that on one prior occasion Sgt. Graves had authorized Lt. Hammack to fly with appellant at a time when Sgt. Graves himself was unable to give instructions (Tr. 63-66). Appellant offered no evidence to indicate that Sgt. Graves had authorized the flight which gave rise to the injuries. Indeed, his testimony plainly indicated that Sgt. Graves was wholly unaware of the flight in question until after it had taken place (Tr. 74-81).

Sgt. Graves testified unequivocally that Lt. Hammack was on no pay status with the Aero Club (Tr. 162). He also testified that Hammack was a military pilot, who was on temporary duty at Castle Air Force Base for three months, and that he had a civilian commercial pilot's license, and that he was an authorized check pilot (Tr. 163). He contradicted appellant's charge that he had made a back-dated entry in appellant's log, and testified that he had not authorized Lt. Hammack to give instruction to appellant, and that he did not recall any telephone

conversation in which he had authorized appellant to fly with Hammack (Tr. 153-155); and that it was proper for any rated pilot, including a "check pilot," to take a student for a ride so long as the rated pilot does the flying (Tr. 165).

The district court found that Hammack's negligence was the proximate cause of appellant's injuries, that there was no mechanical difficulty with the airplane, and that there was no negligence by Sgt. Graves in his management of the Aero Club (R. 78, Finding VII). The court also found that, althoug Sgt. Graves had authorized a prior flight by Lt. Hammack with appellant, he had not authorized the flight on the day in question (R. 78-79, Finding VIII); and that, although there was no express financial arrangement between appellant and Hammack, there was an implied obligation on appellant's part to pay Hammack a $3 per hour fee (R. 79, Finding IX). The court found that the flight was an independent recreational activity, and ruled that appellant's injuries did not arise out of or in the course of military duty, within the exception of the Tort Claims Act announced in Feres v. United States, 34 U.S. 135 (R. 79, Conclusion II). Lastly, the court found that Hammack was not acting as an agent of the Club or the United States at the time of the flight in question (R. 79, Finding X).

Based upon the foregoing findings and rulings the district court concluded that the appellant's injuries were caused sole

by the negligence of Hammack, and that he was not flying the airplane as an employee or agent of the United States or its instrumentality, the Castle Air Force Base Aero Club (R. 80, Conclusions I, II, III). Accordingly, the court ruled that appellant's action could not be maintained against the United States, under the Federal Tort Claims Act (28 U.S.C. 1346(b)) which permits suits against the Government only for negligent acts or omissions of its employees acting within the scope of their employment (R. 80, Conclusion VII); and entered a judgment dismissing appellant's complaint for want of jurisdiction over the United States (R. 80). From that judgment, appellant takes this appeal (R. 83).

QUESTIONS PRESENTED

1. Whether the district court was clearly erroneous in finding that the pilot of the airplane was not an agent of the Aero Club, and that the president of that Club was not negligent.

2. Whether the district court erred in ruling that the pilot of the airplane was not an employee of the Aero Club within the meaning of the Federal Tort Claims Act.

3. Whether appellant can raise a factual issue for the first time in this Court, when he stipulated, in a pre-trial conference order, that the issue was not in the case.

STATUTES AND REGULATIONS INVOLVED

1. The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, provides in pertinent part:

> §1346(b). Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
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> * * * * * *
>
> §2671. Definitions
> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term --
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.
>
> * * * * * *

§2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The pertinent provisions of the Air Force Regulations and the Constitution and By-Laws of the Castle Air Force Base Aero Club are set forth as an Appendix to this brief, infra, pp. 1a-9a.

ARGUMENT

Introduction and Summary

The Aero Clubs of the various Air Force installations which are organized as non-appropriated fund activities[2] are instrumentalities of the United States. Their employees may be considered employees of the United States for purposes of the Federal Tort Claims Act.[3] However, a member of such a club who uses its airplanes is no more an employee of the club, within the meaning of that Act, than a purchaser of goods at a post exchange is an employee of the exchange, or a member of an officers' club is an employee of the club United States v. Hainline, 315 F. 2d 153 (C.A. 10, 1963), 375 U.S. 895 Similarly, Air Force personnel flying club airplanes on their own time (while off duty) are not acting within the scope of their military employment, within the meaning of the Federal Tort Claims Act. Ibid.

Apparently recognizing and accepting these principles,[4] appellant bases his appeal upon the theory that Hammack was

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[2] Some Aero Clubs are organized as private associations See AFR 34-14, ¶ 1c, infra, pp. 2a . Such clubs would not be instrumentalities of the Government.

[3] United States v. Holcombe, 277 F. 2d 143 (C.A 4, 1960); Accord: Forfari v. United States, 268 F. 2d 29 (C.A. 9, 1959), certiorari denied 361 U.S. 902; Rizzuto v United States, 298 F. 2d 748 (C.A. 10, 1961).

[4] If Hammack had been flying the airplane within the scope of his employment as an employee (officer) of the Air Force, appellant who was in the same status, could not at any rate recover under the Tort Claims Act because the flight would then have been incident to appellant's military duty, and his claim for damages for personal injuries not actionable under the Tort Claims Act. Feres v United States, 340 U.S. 135.

.ying the airplane as an employee of the Castle Air Force
ıse Aero Club, because he was a "check pilot" and upon the
'ound that the president of the club negligently authorized
.m to fly a club airplane.

Apart from the fact that all duly licensed members were
ıthorized to fly club airplanes, the trouble with appellant's
ıeory is that there is no evidence in the record to indicate
ıat Hammack was employed by the Club or that check pilots
ere club employees; and the uncontroverted evidence was that
e was a member of the Club, and was on no pay status of any
.nd with the Club. Moreover, the record disclosed no
.tributes of an employer-employee relationship between Hammack
ıd the Aero Club. The district court was therefore entirely
orrect in finding that Hammack was not an agent of the Club,
ıd in ruling that he was not flying the airplane as an employee
the United States. Appellant's contention, raised for the
.rst time in this appeal, that the president of the Aero Club
ıs negligent in authorizing Hammack to fly with appellant, is
oreclosed by the pre-trial stipulation and order, and the
.strict court's finding that he was not negligent.

I

THE PILOT, WHOSE NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF APPELLANT'S INJURIES, WAS NOT FLYING THE AIRPLANE AS AN EMPLOYEE OF THE UNITED STATES OR ITS INSTRUMENTALITY, THE CASTLE AIR BASE AERO CLUB.

A. The Record Fully Supports The District Court's Finding That Hammack Was Not An Agent Of The Castle Air Force Base Aero Club.

The district court found as a fact that "Lt. Hammack was not acting as an agent of the club and hence not an agent of the Government at the time of the flight in question" (R. 79, Finding X). Appellant challenges the finding on the grounds that it is merely a conclusion and is incorrect We show here that the court's finding is fully supported by the evidence, which shows that Hammack was flying the airplane on behalf of appellant and that if he was anyone's agent, he was an agent of appellant.

1. The evidence concerning Lt. Hammack's status in relationship to the Aero Club may be briefly recapitulated here. It has, of course, been conceded from the beginning of the litigation that Hammack was a member of the Aero Club (R. 5,27). There was virtually no evidence to indicate that he was also an employee, and there was positive evidence that he was not. Appellant himself testified that Lt. Hammack was not a full time employee of the Aero Club (Tr. 124-125), and submitted no testimony, club records or any other form of evidence to indicate that Hammack was employed by the Club for any purpose or in any capacity. Indeed, when asked on cross-examination if Hammack "worked at the Club," appellant replied (Tr. 125):

Well, I don't believe that anybody actually worked at the Club full time, except maybe Sgt. Tilson * * *.

nd when pressed as to whether Sgt. Graves or anybody else as working for the Club part time, appellant merely replied nat Sgt. Graves was president of the Club (Ibid.). Appellant's vn testimony, therefore, strongly suggests that he recognized nat Hammack was not employed by the Club, either on a full part time basis.

On direct examination of the president of the Aero Club, gt. Graves, counsel for appellant carefully refrained from sking whether Hammack was employed by the Club in any capacity Tr. 151-159). On cross-examination, Sgt. Graves testified nequivocally that Hammack was not paid by the Club for any ork and was not on any pay status with the Club (Tr 162). n context, the clear inference from Sgt. Graves' testimony as that Hammack was not employed by the Club in any capacity Ibid.)

The record discloses that Hammack was flying the airplane s a member of the Aero Club, under an agreement with appellant. ppellant testified that he went to Buller Field in the hopes f his finding his instructor (Sgt. Graves) there, so that he ould have further instruction (Tr.75). When he discovered nat his instructor was not there, he requested Hammack to ccompany him on a flight and, when Hammack agreed, appellant ented the airplane from the Aero Club, and they took off Tr. 75-76; R. 60). It was the custom and practice for students

and passengers to pay $3 an hour to the pilot in similar circumstances, and the district court found that appellant was impliedly obliged to pay Hammack $3 an hour for this trip (R. 79, Finding IX). From these conceded facts, it seems clear that Hammack was engaged by appellant to accompany him on the flight. If Hammack was anyone's agent in flying the airplane, therefore, the record discloses that he was the agent of appellant, and not an agent of the Aero Club.

Appellant relies upon the fact that Hammack was on the Aero Club's list of authorized check pilots (Tr. 163, R. 60) to support his argument that Hammack was acting as agent for the Aero Club in flying the airplane (Brief for Appellant, pp. 12, 14, 18-19). But there was no showing that pilots, who were on the Club's list of authorized check pilots flew, the airplanes as agents of the Club. On the contrary, the evidence shows that the student and passenger members of the Club privately selected and engaged the flight instructors and check pilots they wished to have and were free to make their own financial arrangements with them (Tr. 131-132). Indeed, as appellant testified, one of his instructors was the proprietor of "Bob Swann's Flying Service," while a second instructor was an employee of that organization (Tr. 59-60). There was a total absence of proof of any contractual or pay relationship between the Aero Club, on the one hand, and the flight instructors and check pilots on the other. The clear implication of the record is that check pilots and flight instructors were engaged by the student and passenger members,

s independent contractors or employees; and that, as such, hey were agents of the members who engaged them and/or heir private employer and were not agents of the Aero Club.

Appellant also attempts to rely upon the fact that gt. Graves had previously authorized a flight in which Hammack as to accompany appellant (Brief for Appellant, pp. 18-19). t is, of course, true that Sgt. Graves, as president of the ero Club, was authorized to approve or disapprove particular lights. But as the by-laws expressly state, his decision in hat regard was to be based upon the "suitability of all quipment" and the qualifications of the members for the type f flight involved (By Law, ¶ 4, b, infra, p.8a). His uthorization of the prior flight therefore reflected only is view that Hammack was qualified to fly the airplane with ppellant in it. The record does not support the view that gt. Graves authorized Hammack to fly the airplane on behalf f the Club, or as an agent of the Club (Tr. 62-65, 153-155, 65-167).

Rule 52(a) of the Federal Rules of Civil Procedure rovides, of course, that the district court's "findings of act shall not be set aside unless clearly erroneous, and due egard shall be given to the opportunity of the trial court o judge of the credibility of the witnesses." An appellate ourt may set aside a district court finding as "clearly rroneous," only if the reviewing court on the entire record s left with the firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U.S. 364, 395. An appellant challenging factual findings has a very heavy burden on appeal, which the Supreme Court has recently described as "an almost insurmountable burden." International Boxing Co. v. United States, 358 U.S. 242, 252. As this Court has recently ruled (Lundgren v. Freeman, 307 F. 2d 104, 113):

> We are bound by Rule 52(a) F.R. Civ.P., which provides that: "findings of fact shall not be set aside unless clearly erroneous * * *." Therefore, we may not substitute our judgment if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which could have been drawn by reasonable men.

Accord: Stacher v. United States, 258 F. 2d 112, 118 (C.A. 9, 1958) (district court findings entitled to "all favorable inferences").

On the facts disclosed from this record it is doubtful that a reasonable man could infer that Hammack was flying the airplane as an agent of the Aero Club. Certainly, the district court's finding that he "was not acting as an agent of the Club" (R. 79, Finding X) is reasonable and fully supported by the evidence of record. Accordingly, it is not "clearly erroneous" and should be accepted by this Court Lundgren v. Freeman, supra; United States v Grissler, 303 F. 2d 175, 176 (C.A. 9, 1962). And since Hammack was not an agent of the Aero Club, he was not acting"on behalf of" the Aero Club, was not an employee of the United States within the meanin of the Tort Claims Act. 28 U.S.C. 2671, supra, p 10 .

B. The District Court Ruling that Hammack Was Not An Employee of the Aero Club Is, at Any Rate, Correct.

Because the record fully supports the district court's inding that Hammack was not flying the airplane as an agent the Aero Club, and it is conceded that he was not acting ithin the scope of his military employment, that finding is, believe, dispositive of appellant's contention that the nited States is liable for his negligent conduct. For the ake of completeness, however, we show here that appellant ould not be able to prevail even if that finding could be onsidered "clearly erroneous."

The Tort Claims Act permits suits against the United tates only for the negligence of its employees. 28 U.S.C. 46(b), supra, p. 10 . Even apart from the district ourt's finding that Hammack was not flying the airplane s an agent of the Aero Club, the other factors necessary o a showing of an employer-employee relationship were wholly bsent in the relationship between the Aero Club and Hammack. he district court's conclusion that Hammack was not acting within the scope of any office or employment at the time the accident in question" (R. 80, Conclusion VI) is herefore correct, regardless of whether Hammack was acting s an agent of the Aero Club.

Although the state law governs the determination of hether an employee is acting "within the scope of his mployment" under the Federal Tort Claims Act (28 U.S.C.

1346(b)),[5] the question of whether a person is an employee within the meaning of that Act (28 U.S.C. 1346(b) and 2671) is determined by federal law. Pattno v. United States, 311 F. 2d 604 (C.A. 10, 1962), certiorari denied, 373 U.S. 911; United States v. Hainline, 315 F. 2d 153 (C.A. 10, 1963), certiorari denied, 375 U.S. 895. Accord: United States v. Wendt, 242 F. 2d 855 (C.A. 9, 1957). Accordingly, our discussion of this issue is in terms of Federal law.[6]

It has long been a basic principle of agency law that the putative employer's right to control and direct the manner in which work is to be done is an essential element in determining whether an individual is an employee of another for purposes of vicarious tort liability. As the Supreme Court has ruled, Singer Manufacturing Co. v. Rahn, 132 U.S. 518, 523 (1889):

> * * * the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished * * *

This rule, which is, of course, based upon the elemental unfairness of imposing liability on one person for the activities of another over which he has no control, was

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[5] Williams v. United States, 350 U.S. 587 (1955); Callaway v. Garber, 289 F. 2d 171 (C.A. 9, 1961).

[6] Federal law and the law of California both adopt the tests of the Restatement, Agency 2d Sec. 220, and appear to be identical on this matter. Compare Isenberg v. California Employment State Co., 30 Cal. 2d 34, 180 P. 2d 11, 15; with Strangi v. United States, 211 F. 2d 305, 308 (C.A. 5, 1954).

mbodied in the Federal Tort Claims Act.[7/] In the absence of uch a right in the United States or its agencies to control he conduct of the asserted employee, the courts have held that here is no employer-employee relationship within the meaning f the Act and have refused to impose liability upon the nited States. E.g., Strangi v. United States, 211 F. 2d. 305, 07-308 (C.A. 5, 1954); Harris v. Boreham, 233 F. 2d 110 C.A. 3, 1956); Lavitt v. United States, 177 F. 2d 627 (C.A. , 1949). As the Fifth Circuit stated in Strangi (211 F. 2d t 307):

> The distinction between the master-servant and independent contractor relationship lies largely in the degree of control or right of control retained by the employer over the details of the work as it is being performed * * *

This vital "control" factor is missing here. There as absolutely no showing that the Club or any of its officers ad the right to tell Hammack where, how, or when to fly the irplane, or whether he should fly it at all. Indeed, appellant's wn testimony makes it clear that the Aero Club had no such ights. It was conceded that appellant requested Hammack to ccompany him on the flight in question (R. 60). From ppellant's own testimony it was also clear that Hammack was ree to refuse appellant's request and that the arrangements or the flight were exclusively between Hammack and appellant

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/ In adopting Pub. L. 86-740, 74 Stat. 178, 32 U.S.C. (Supp. I) 715, Congress based its decision that the United States hould not be liable for the negligence of members of the ational Guard upon the absence of Federal control over the ational Guard while in state service. Sen. Rept. 1502, 86th ong., 2d Sess., p. 4; H. Rept. 1928, 86th Cong., 2d Sess., p. 4.

(Tr. 75-76, 131-133). The time, length and itinerary of the trip were obviously matters to be determined between Hammack and appellant (Ibid.). Since Hammack was on his own time, free to fly or not as he saw fit, the Aero Club obviously did not have the right to control the details of his conduct which is a prerequisite to the imposition of vicarious tort liability under the Tort Claims Act.

Other factors normally present in the employer-employee relationship are wholly absent in the relationship between the Aero Club and Hammack. See, Restatement, Agency 2d, Sec. 220; Strangi v. United States, 211 F. 2d 305, 307-308. The Aero Club did not pay Hammack in any way (Tr. 162), and the only remuneration Hammack could expect for the flight would come from appellant (R. 79). Compare, Restatement, Agency 2d, Sec. 220(g). As a pilot, Hammack had a skilled and distinct occupation, and the record strongly suggests that instructors and check pilots in the area acted as specialists, without supervision.[8/] Id., Sec. 220(b), (c) and (d). The airplane for the flight in question was rented and furnished by appellant (R. 77, Finding II). Id., Sec. 220(e). Hammack appears to have been employed only for the duration of the flight (Tr. 131-132). Id., Sec. 220(f). And there is nothing in the record which suggests that giving members rides was a part of the regular business of the Aero Club, or that the officers of the Club and/or Hammack believed they were creating an employer-employee

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8/ One of appellant's instructors was the independent proprietor of a local flying service (Tr. 59-60).

relationship. Id., Sec. 220(h) and (i).

In short, appellant has failed to prove any of the elements necessary to showing that Hammack was an employee of the Aero Club. On this record, therefore, the district court's ruling (R. 80, Conclusion VI) that he was not flying the airplane as an employee of the Club must be sustained.

II.

ANY ISSUE AS TO THE NEGLIGENCE OF THE PRESIDENT OF THE AERO CLUB WAS FORECLOSED BY THE PRE-TRIAL ORDER; AND THE DISTRICT COURT'S FINDING THAT HE WAS NOT NEGLIGENT IS FULLY SUPPORTED BY THE EVIDENCE

In the district court appellant based his case solely upon the theory that Hammack was an employee of the Aero Club, so that the United States was liable for his negligent piloting of the airplane. Nevertheless, appellant now asserts on appeal that the district court erred in failing to find negligence on the part of Sergeant Graves, the President of the Club (Brief for Appellant, pp. 15-17, 19).

A. The short answer to appellant's assertion is that appellant has waived the issue. The Pre-Trial Conference Order stated that the action was one for damages based upon the "alleged negligence on the part of defendant *** on the part of MAURICE H. HAMMACK as agent or employee ***" (R. 58). Similarly, jurisdiction was based solely upon the ground that Hammack was acting as an employee of the Government, through the Aero Club (R. 59). While the negligence of Hammack was not contested,

there was no reference to possible negligence on the part of Graves in the facts which were admitted or not contested, or included in "the following issues of fact, and no others, remain to be litigated upon trial" (R. 59-61). Similarly, whil one of the listed "issues of law" was whether Hammack's negligence was a proximate cause of appellant's injuries, there was no reference to any casual relation between appellant's injuries and possible negligence on the part of Graves among "The following issues of law, and no others, remain to be litigated (R. 63-64). Indeed there was no reference to possible neglige on the part of Graves in the entire pre-trial order (R. 58-65) In addition to specifying the only issues of fact and law whic remained to be tried, the order specified that it would "gover the course of the trial of this cause, unless modified to prevent manifest injustice" (R. 64-65). It was signed "Approved as to Form and Content" by counsel for both parties (R. 65).

The order formulated and narrowed the issues between the parties. The Government, for example, agreed not to contest the asserted negligence of Hammack, while appellant limit his claim to the asserted negligence of Hammack. By specifyin the issues which remained to be litigated, "and no others," the order clearly foreclosed any claim on appellant's part bas upon assertions of negligence on the part of those other than Hammack.

One of the basic purposes of pre-trial conferences pursua to Rule 16 of the Federal Rules of Civil Procedure is, of cour

to facilitate "The simplification of the issues" in dispute between the parties. Rule 16, Fed. R. Civ. P.; Fowler v. Crown Zellerback Corp., 163 F. 2d 773 (C.A. 9, 1947). Where the pre-trial conference order frames and limits the issues with the agreement, or without the objection, of the parties, therefore, the order "controls the subsequent course" of the litigation,"unless modified at the trial." Rule 16, Fed. R. Civ. P. Unless the order is so modified, a party is therefore precluded from raising an issue at trial which was omitted from the pre-trial order. First Federal Savings & Loan Assn. v. United States, 295 F. 2d 481 (C.A. 9, 1961); Fowler v. Crown Zellerback Corp., supra. 1A Barron & Holtzoff, Federal Practice, Sec. 473, pp. 844-851.

These principles are controlling here. Having stipulated and agreed that his case was based solely upon the asserted negligence of Hammack, appellant is in no position to urge district court error for refusing to find negligence on the part of Graves. In similar circumstances, this Court has recently stated (First Federal Savings & Loan Assn. v. United States, supra, 295 F. 2d at 482-483):

> We need not comment upon the impropriety of this Court considering reversal of a district court judgment for failure to pass upon an issue never framed for consideration by that court.

It would, we think, be equally improper for this Court to consider a challenge to the district court judgment in this case,

for its refusal to find that Graves was negligent, when appellant never contended in that court that he was negligent, and the issue was never framed for consideration by that court.

It is, of course, true that evidence was admitted upon which a finding of negligence or no negligence on the part of Graves could have been based (see infra, p. 27). But that testimony, admitted over objection by Government counsel was to show the circumstances under which Hammack made his flight (R. 65), and was also pertinent to show the relationship between Hammack and the Aero Club. For that reason "it cannot be argued that the receipt of the evidence * * * enlarged the issues" as framed by the pre-trial order. First Federal Savings & Loan Assn. v. United States, supra, 295 F. 2d at 482.

After the close of the testimony, and the informal ruling of the court that Hammack was not acting as an employee of the Aero Club, counsel for appellant requested the court to "make a ruling on the issue of ostensible agency as create by Sergeant Graves in Lieutenant Hammack" (Tr. 221). In the resulting discussion, the court stated, "I don't find any negligence on the part of Sergeant Graves" (Tr. 222). Appellant apparently did not object to that proposed finding (Tr. 222; R. 70-72). The formal finding to the same effect was entered (R. 78, Finding VII).

Having stipulated in the pre-trial order to the effect that there was no issue pertaining to possible negligence on the part of Graves, and having failed to object to the proposed finding that Graves was not negligent, appellant should not now be heard to complain that the district court erred in making the finding. His contentions in this regard should not be considered by the court. First Federal Savings & Loan Assn. v. United States, 295 F. 2d 481 (C.A. 9, 1961).

B. At any rate, the district court found specifically that Sgt. Graves was not negligent in his management of the affairs of the Aero Club (R. 78, Finding VII). Contrary to appellant's contention (Brief for Appellant, p. 14), there is no ambiguity in the finding and no reasonable basis for doubt as to its meaning. After ruling, in accordance with a request of counsel for appellant, that Graves had authorized a prior flight of Hammack with appellant (Tr. 221-222), the court stated (Tr. 222):

> I don't find any negligence on the part of Sergeant Graves.

It is therefore clear that the district court found that Graves was not negligent in any pertinent respect, including his authorization to Hammack to fly with appellant approximately a week before the flight (Tr. 221-222).

The only evidence upon which a contrary finding could have been based was the testimony of appellant himself. Appellant testified that on May 29, 1959, when Sgt. Graves was unable to

keep an appointment with him for flying instruction, Graves spoke to Hammack on the telephone, Hammack took appellant in an airplane, and let him fly solo, and that Sgt. Graves later made a false, back-dated entry in appellant's log book, in which he gave appellant credit for instruction time, and listed himself as instructor (Tr. 62-73). From this testimony appellant infers that Graves authorized Hammack to act as appellant's instructor (Brief for Appellant, pp. 14, 19), although it was stipulated in the pre-trial conference order that Hammack accompanied appellant "as a check pilot" (R. 60).

Sgt. Graves forcefully denied that he had ever made any back-dated entries in appellant's log, and testified that he had never authorized Hammack to give flight instruction to appellant (Tr. 153-155). This testimony was in no way shaken on examination by counsel for appellant (Tr. 165-167, 167-170).

Having had the opportunity to observe the demeanor of the witnesses and to judge their credibility, the district judge was in a position to determine which of the inconsistent stories to believe. And the district court's resolution of conflicts in testimony cannot, of course, be disturbed here. Rule 52(a) Fed. R. Civ. P.; Soby v. Johnson, 270 F. 2d 193 (C.A. 9, 1959).

Appellant concededly did not hear Sgt. Graves authorize Hammack to give him instruction, but merely deferred the authorization from later conduct, while Sgt. Graves expressly and

emphatically stated that he had not given any such authorization. Moreover, the parties stipulated that Hammack accompanied appellant "as a check pilot" (R. 60). In light of this record, the district court's finding that Sgt. Graves was free from negligence is not only reasonable, but is supported by the preponderance of the evidence.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

March 1964.

CERTIFICATE

I certify that, in accordance with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID L. ROSE
Attorney for Appellee.

APPENDIX

1. Air Force Regulation AFR 34-14, provides in pertinent part:

*AFR 34-14
1-4

AIR FORCE)
REGULATION)
NO. 34-14)

DEPARTMENT OF THE
AIR FORCE
Washington, 14 April 1959

Personnel Services

AIR FORCE AERO CLUBS

This regulation authorizes commanders to establish Air Force aero clubs organized as sundry fund activities, tells them how to do so, and states what controls commanders should place on operation of the clubs. Its provisions, together with other Air Force regulations cited herein and applicable parts of Civil Aviation Regulations published by the Federal Aviation Agency (FAA), apply to Air Force aero clubs worldwide.

1. SPECIFIC APPLICABILITY.

a. Within the continental United States, commanders will follow the policies and operational principles prescribed by this regulation and other regulations cited above.

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* This regulation supersedes AFR 34-14, 9 February 1956.
OPI:AFPMP
DISTRIBUTION:B

b. Outside the continental United States, commanders may augment this regulation in any manner to comply with the rules and regulations of the country in which they are located, provided they do not deviate from the intent of this regulation.

c. This regulation does not apply to aero clubs established as private associations (see AFR 176-1).

2. PURPOSE OF AERO CLUBS. Aero clubs are designed to stimulate an interest in aviation; to provide authorized personnel with an opportunity to engage in flying as a recreational activity; and to encourage and develop skills in aeronautics, navigation, mechanics, and related aero sciences useful to the Air Force mission.

3. HOW TO ESTABLISH AERO CLUBS.

a. Major air commanders may approve the establishment of aero clubs as sundry fund activities in keeping with AFR 176-1 to operate as instrumentalities of the Federal Government under the auspices of the Air Force.

b. An Air Force aero club must organize under a constitution or charter and by-laws which provide for its operati and dissolution consistent with this and other other(sic) applicable regulations.

c. An Air Force aero club may carry the name of its base location; for example, a club formed at Randolph Air Force Base may be known as the "Randolph Air Force Base Aero Club."

d. Local policies and regulations may be issued to insure that clubs operate smoothly, efficiently, and properly, provided the policies and regulations are consistent with this and other applicable regulations.

4. MEMBERSHIP IN AERO CLUBS. Membership in an Air Force aero club shall be voluntary. Active membership will be limited to active duty military personnel of the Armed Forces. Associate membership may be extended to the following:

a. Dependents of military personnel.

b. Retired military personnel and their dependents.

c. Civilians employed by the Air Force or by non-appropriated fund activities of the Air Force.

d. Military personnel of foreign governments on duty with the Department of Defense.

5. ASSIGNMENT OF PERSONNEL. Responsibilities for adequate supervision and control of clubs may require limited utilization of personnel to perform the command functions cited in the following paragraph. However, military and civilian personnel, paid from appropriated funds, will not be assigned to clubs specifically to perform maintenance, instructional and general administration, and operational duties. As sundry fund activities, clubs are expected to operate on a self-sustaining basis; therefore, provisions of AFR 176-1, on the use of military personnel are not applicable.

6. COMMAND SUPERVISION OF CLUB OPERATION. Commanders will supervise club operation to insure that:

a. Appropriate operational and administrative procedures are established and followed to insure maximum safety of flight. The rules and regulations of the FAA should be supplemented, if required, based on the flying experience available within the club.

b. The club maintains an effective air-ground safety program.

c. The club operates on a self-supporting basis in a businesslike manner to assure financial stability, and club fund accounting procedures are consistent with those prescribed by AFM 177-4.

d. Authorization is granted members of Air Force aero clubs to pilot USAF aircraft on loan, provided:

(1) Member holds currently effective airman's certificate issued by FAA for type of aircraft and operation involved, or

(2) Member has not qualified for FAA rating, but is undergoing student pilot training in accordance with current operational procedures prescribed by FAA and the aero club concerned.

e. Coordination and working relationship is established with the local FAA inspector to insure maximum assistance for club operations.

f. Hobby shop facilities and other equipment are made available, when possible, to assist club members in maintaining and repairing aircraft.

g. Sale of petroleum products is in accordance with AFR 67-147.

h. Authorization for use of Air Force installations by aero club aircraft is determined by paragraphs 2a(1) and 11, AFR 55-20, 26 February 1959.

* * * * * * *

11. INSURANCE REQUIRED. Provisions of AFR 176-8 give guidance with respect to public liability insurance coverage for Air Force aero clubs, including insurance covering public property damage, public bodily injury, and passenger bodily injury. However, the provisions of that regulation are not applicable to:

a. Individually owned aircraft which may be used by club members. In such cases commercial insurance coverage, as required by AFR 87-7, will be provided by the individual.

b. Hull insurance on aircraft owned by the aero club or individual club members. Hull insurance should not be carried on aircraft on loan from the Air Force. Title to the aircraft rests with the United States Government; therefore insurance companies do not have salvage rights to the aircraft.

Inasmuch as areo clubs are classified an nonappropriated fund activities, commercial public liability insurance is not required. However, where it is determined that local circumstances make it advisable, such coverage may be obtained when specifically approved by the Air Force Welfare Board. Requests for exception should be submitted through channels to Headquarters USAF, ATTN: AFPMP-WB. All civilians and foreign nationals rifing as passengers will accomplish a Release From Claim For Injury or Death, outlined in AFR 76-6, prior to flights in aero club aircraft.

BY ORDER OF THE SECRETARY OF THE AIR FORCE:

THOMAS D. WHITE
Chief of Staff

Official:
J. L. TARR
Colonel, USAF
Director of Administrative
Services

2. The Constitution of the Castle Air Force Base Aero Club provided:

C O N S T I T U T I O N

ARTICLE I
Name

The name of this Organization shall be the CASTLE AIR FORCE BASE AERO CLUB.

ARTICLE II
Purpose

The purpose of this Organization shall be to stimulate an interest in aviation; to provide authorized personnel with an opportunity to engage in flying as a recreational activity; and to encourage and develop skills in aeronautics, navigation, mechanics and related aero-sciences useful to the Air Force mission.

ARTICLE III

Section A. Membership shall be on a voluntary basis and open to active-duty personnel and their dependents, retired military personnel and their dependents, and civilians employed by the Air Force who are paid from appropriated or nonappropriated funds.

Section B. The number of members shall be limited at the discretion of the Executive Board, based on the amount of equipment available so as to afford each active member an opportunity to fly a reasonable amount of time and engage wholeheartedly in all phases of club activities.

Section C. A member may be suspended indefinitely or for a stated period by majority vote of the Executive Board in the event that:

1. The conduct of the member is prejudicial to the best interests of the club.

2. The member fails to discharge his indebtedness to the club.

Section D. Membership shall be terminated upon written notification to the Secretary by the individual concerned, or, for cause, by majority vote of members of the Executive Board.

ARTICLE IV

Executive Board

The Officers of this Organization shall be the President Vice-President, Secretary, Treasurer, Operations Manager, and Aircraft Maintenance Director. These officers shall comprise the Air Force Aero Club Executive Board, and all matters of policy shall be handled through this group for approval by a majority of the club members.

ARTICLE V

Finances

It is the responsibility of the Executive Board to insure that the club operates on a self-supporting basis in a business-like manner to assure financial stability at all times. Initiation fees, membership dues, rental fees and other financial assessments shall be determined by the Executive Board.

ARTICLE VI

Liability

Insurance shall be carried on all aircraft to protect the members from liability and damages incurred while participating in bona fide club activities. No member can obligate the Aero Club except as set forth in the Constitution and By-Laws.

ARTICLE VII

Quorums and Meetings

Section A. The time, place, and frequency of general meetings shall be determined by the Executive Board. One-third of the total membership will constitute a quorum.

Section B. The President of the Executive Board shall determine the time, place and frequency of Executive Board meetings. Three members shall constitute a quorum.

ARTICLE VIII

Amendments

This Constitution may be changed, amended or superseded only by a two-thirds vote of the membership at a general meeting. At least seven days in advance, the membership must

be notified of matters to be considered at meetings during which any proposed change, amendment, or supersession of this Constitution is to be considered.

ARTICLE IX

Dissolution

Upon dissolution of the Aero Club the Executive Board shall be designated as a Board of Trustees to liquidate the assets of the club as soon as possible and to pay all existing debts and liabilities in proportion to the final available capital, including any money due to members as refunds. The disposition of residual assets will be as prescribed by applicable Air Force Regulations.

2. The By-Laws of the Castle Air Force Aero Club provided in pertinent part:

BY-LAWS

1. PURPOSE. The purpose of this Air Force Aero Club shall be to stimulate an interest in aviation and provide personnel with an opportunity to engage in recreational flying and to encourage and develope skills in aeronautics, navigation, mechanics and related aero-sciences useful to the Air Force mission.

* * * * *

3. EXECUTIVE BOARD.

a. The powers, business and property of the Club shall be exercised, conducted and controlled by the Executive Board of six (6) members.

b. Each member of the Executive Board shall be elected at the annual meeting of the members of the Club.

c. In case of a vacancy on the Board, the remaining Board members shall fill such vacancy by appointment from the Club membership. If three or more vacancies occur at any one time, they shall be filled by vote of the members at the meeting duly called.

d. Immediately after each annual meeting of members, the newly elected Board members shall hold a meeting and organize by election of President, Vice-President, Secretary,

Treasurer, Operations Manager and Aircraft Maintenance Director shall be elected by the Executive Board from their own number at the first meeting after organization of the Club and thereafter at the first meeting after the regular annual meeting of the members. They shall hold office for one year and until their successors are elected and qualified.

e. The President and Vice-President shall serve without compensation or reward. The Secretary, Treasurer, Operations Manager, and Aircraft Maintenance Director may each receive a specified amount of flying time per month as compensation for their services.

f. The Treasurer shall be bonded, the premium therefor to be at the expense of the Club.

4. PRESIDENT.

A. The President shall be the chief executive of the Club. He shall preside at all meetings of the Club and the Executive Board. He may call any special meeting of the members of the Executive Board and shall have, subject to the advice and control of the Board members, general charge of the business of the Club. He shall execute with the Secretary, in the name of the Club, all certificates of membership, contracts, and instruments other than checks following their approval by the Executive Board.

b. The President shall be responsible to the Executive Board for the operation of the Club. He shall make and enforce decisions regarding the suitability of all equipment and the qualifications of all members for every type of flight operation. He shall recommend for approval to the Executive Board all operational rules of the Club. He shall report all violations of those rules by any member and make recommendations to eliminate such violations.

* * * * *

13. MEMBERSHIP.

a. New members may be admitted to the Club only after being approved by a unanimous vote of the members. Membership shall be limited in number for the first aircraft, with not more than a total of 25 for any additional aircraft.

b. A person duly elected to this Club shall be deemed a member upon payment of an initiation fee. Each member shall be assessed monthly dues in the amount prescribed by the Executive Board, for a period of 12 months, said dues to be payable one month in advance, due on the 15th day of each month. The monthly dues shall be reduced at the end of the 12 month period at the discretion of the Executive Board.

c. Upon receipt of the initiation fee, the Club shall issue to each member a certificate of membership on a form approved by the Executive Board.

d. A member may withdraw from the Club upon written notification to the Secretary 30 days in advance, and said member may make his withdrawal final within the next 90 days without furthur (sic) notification, provided that the withdrawing member has disposed of his share in the assets of the Club to the Club or to a new member acceptable to the Club. The Club shall have the first option to purchase the share of a member wishing to withdraw from the Club and the Club shall have 30 days from the withdrawal notice to exercise this option.

c. Any member who has failed to pay his dues or any sum due the Club within 15 days after said sums shall be due, shall be considered a delinquent member and shall be automatically suspended from flying the Club aircraft. Wheb (sic) a deliquent member fails to pay his dues, to pay any sum owed to the Club or to make appropriate arrangements with the Executive Board for the payment thereof within 60 days of the due date, the member shall automatically be considered as indicating his intention to withdraw.

f. A member may be expelled by a two-thirds vote of the members voting at any regular or special meeting. Ten days notice shall be given to each member, who shall have the right to be heard either in person or by counsel at a meeting of the Club for this purpose. A member so expelled shall receive from the Club a sum equal to his original membership fees less any dues or other monys owed to the Club.